No. 92-1879

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In The

Supreme Court of the United States

October Term, 1992

PLUMBERS LOCAL UNION NO. 94, AFL-CIO,

Petitioner,

vs.

KOKOSING CONSTRUCTION CO., INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Ohio

BRIEF IN OPPOSITION FOR RESPONDENT KOKOSING CONSTRUCTION CO., INC.

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This brief is submitted by Kokosing Construction Company in response to the petition for writ of certiorari as filed by Plumbers Local Union No. 94, AFL-CIO.

COUNTERSTATEMENT OF FACTS

A. The Parties.

Kokosing Construction Company, Inc. ("Kokosing"), one of the respondents, is engaged in the business of general construction contracting. Kokosing typically bids upon and performs construction projects, including municipal waste water treatment plants. Kokosing is a unionized contractor. By virtue of its assignment of bargaining rights to the Labor Relations Division of the Ohio Contractors Association ("OCA-LRD"), Kokosing is signatory to various labor union contracts in Ohio, including contracts with the Operating Engineers Union, Cement Masons Union, and Laborers Union (Walker Affidavit ¶¶ 3 and 4).[1]

Kokosing has no contract with petitioner Plumbers Local Union No. 94 ("Local 94" or the "Plumbers") (*Id.*). The Plumbers Union has its own multi-employer collective bargaining agreement with the Stark County Association of Plumbing, Heating and Cooling Contractors for a geographical area that includes Stark, Wayne and Morrow Counties (Fonte Deposition, Exh. 6).[2]

In the Canton, Ohio area, Kokosing has utilized employees who are members of petitoner Local No. 1015, Laborers Union, pursuant to its agreement negotiated by and between the OCA-LRD with the Laborers' District Council of Ohio (Walker Affidavit ¶4). This contract defines its scope to include "all work in

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1. All references herein to "Walker Affidavit" refer to the affidavit of Kokosing Sr. Vice President Daniel Walker filed by Kokosing Construction Co., Inc. in the Stark County Common Pleas Court, November 21, 1991, in support of its Motion for Summary Judgment.

2. All references herein to "Fonte Deposition" refer to the deposition of Plumbers Local 94 Business Agent John Fonte filed in the Stark County Common Pleas Court on November 21, 1991.

construction of pumping stations, waste and sewage disposal plants, incinerator plants, water treatment plants, filtration plants and solid waste disposal plants" (Agreement at Art. II, ¶II(g), Exh. 1 to Walker Affidavit).

B. The Canton, Ohio Water Pollution Control Center Project.

In May, 1987, the respondent City of Canton, Ohio ("Canton") advertised and solicited bids for the construction of certain improvements to its Water Pollution Control Center (the "Project") (Local 94 App. to Appeal Brief at p. 019).[3] The Project was separated into four contracts for bidding: General; Heating, Ventilating and Air Conditioning; Plumbing; and Electrical (*Id.*). Kokosing was the successful bidder on the General Construction Project, consisting of work that included:

> [C]onverting the existing oxidation ditch system to a new diffused aeration system, including the construction of a new Compressor Building, furnishing and installing new aeration compressors, air filters, diffuser system, piping, valves, dissolved oxygen probes, air meters, materials handling equipment, and other appurtenant work, including the removal of existing oxidation ditch equipment and appurtenances.

(*Id.*).

Kokosing did not submit a bid for the plumbing contract which included "furnishing and installing all drains, vents, piping

3. All references herein to "Local 94 App. to Appeal Brief" refers to the appendix filed by Local 94 in the Fifth Appellate District, Stark County, Ohio in conjunction with its brief on appeal, March 30, 1992.

and other appurtenant work in the new Compressor Building."

C. The Prevailing Wage Requirements Of The Contract.

The contract, as a public work, contained "prevailing wage rate" requirements pursuant to the provisions of Ohio Statutes (Ohio Revised Code, § 4115.03, *et seq.*). Among other things, the contract between Kokosing and Canton contained the following provision:

> [W]ages shall be paid to each employee engaged in the work on the project under this contract at a rate not less than the prevailing rate of wages for the particular trade or occupation in which he is engaged, *nor at a rate less than the minimum listed for his particular trade or occupation in the Wage Determinations made for this project by the Ohio Department of Industrial Relations.*

(Water Pollution Control Center Improvements Contract 17, Instruction to Bidders, Exh. 2 to Walker Affidavit at ¶8) (emphasis added). The Ohio Department of Industrial Relations ("ODIR") wage rate was physically attached to the proposal and made a part of the contract.

In preparing its bid for the Project, Kokosing determined that certain work, such as setting, installing, or fabricating piping, setting compressors and air filters, would be performed by its employees represented by the Laborers' Union. Kokosing assigned work to Laborers Union members in accordance with its past practices, industry practices, the existence of its collective bargaining relationships and efficiency of operations (Walker Affidavit ¶6).

As it had in the past, Kokosing calculated its labor costs initially based upon the prevailing rates determined for the Laborers Union as set forth in the ODIR's wage determination schedule attached to the contract (Walker Affidavit ¶7). The prevailing wage schedule contained wage rates for Laborers for the waste water treatment plant. Kokosing had performed work on various other water pollution control centers in recent years and, in each instance, had performed the work with its employees who were members of the Laborers Union, and at the Laborers' Union wage rate as set forth in the prevailing wage schedules in the contracts for those projects.

D. January 1988: The Plumbers Complain About The Wage Being Paid By Kokosing And Commence An Action Against ODIR.

On January 29, 1988, Local 94's Business Agent, Daniel Fonte, filed a "Prevailing Wage Complaint" with the ODIR which also enforces Ohio's prevailing wage laws. Therein, Mr. Fonte alleged that Kokosing was obligated to use "the Local 94 Union rate" and not "Laborers' Union" rate for the process piping portion of the water treatment plant (Fonte Deposition, Exh. 4). Fonte has unsuccessfully filed other complaints with the ODIR in the past in the Canton and Wooster, Ohio areas, where the Company also used members of the Laborers Union to do similar piping work, and paid the Laborers' wage rate (Fonte Deposition p. 068).

Once again, unsuccessfull in this regard, Local 94 filed an action for declaratory and injunctive relief in the Ohio Court of Claims in August of 1988, seeking to compel the ODIR to determine that the work at issue in this lawsuit should be paid for at the "Plumbers' Union rate." *Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations*, Case No. 88-07618 (Ct. Cl. 1988) (Kokosing App. to Appeal Brief at Tab 9).[4] This action was

4. All references herein to "Kokosing App. to Appeal Brief" refers to the (Cont'd)

dismissed, the court of claims finding that it was without authority to grant mandamus. The court held that Local 94's remedy lay either in an administrative appeal or in a writ of mandamus in a court having jurisdiction over such actions. That decision was upheld, on appeal, based upon lack of jurisdiction of the court of claims to issue a writ of mandamus. *Plumbers Local Union No. 94 v. Ohio Dept. of Industrial Relations*, Case No. 88AP-1047 (Franklin Cty. 1990) (Pet. App. at 1-7).

E. 1989: The Plumbers File, Once Again, A Prevailing Wage Complaint.

Local 94 did not file a writ of mandamus against ODIR in a court having jurisdiction. Instead, Local 94 filed its lawsuit in this matter against Kokosing and the City of Canton. The Laborers Union Local 1015 was joined as an additional party. This suit was filed following the same prevailing wage complaint being lodged with ODIR complaining about the prevailing rate schedule at Canton. As the Plumbers' Union counsel stated:

> However, the Department failed to utilize the Plumbers' labor agreement to set the prevailing wage rates, but apparently utilized the Laborers' labor contract.

(Fonte Deposition, Exh. 7).

The Plumbers maintained that Kokosing should have paid its employees, who were members of the Laborers Union, the so-called "Plumbers' Rate" because the members of the Laborers Union were allegedly performing "Plumbers' work." (Pet. App. at 46-59).

(Cont'd)
appendix filed by Kokosing in the Fifth Appellate District, Stark County, Ohio in conjunction with its brief on appeal, April 23, 1992.

The complaint was subsequently amended to include an allegation against Canton under a new theory, specifically, a violation of Section 153.50 of the Ohio Revised Code, stating that the City of Canton violated a statutory obligation on requiring "separate and distinct proposals" to be made for furnishing work for "each separate and distinct trade or kind of mechanical labor." Only paragraph eighteen of the amended complaint now included Kokosing within its allegations, alleging that the Plumbers had filed, with ODIR, allegations of violations by Kokosing of prevailing wage laws (Pet. App. at 55-56).

F. The Decision Of The Trial Court.

Following the filing of cross motions for summary judgment, the trial court denied the motion of Local 94 and granted motions for summary judgment as filed by Kokosing, the City of Canton, and the Laborers.

The court found that the project had been completed in 1988 and the action was moot, with Local 94 only wanting "precedent in the future" (Pet. App. at 13). The court found that there was no material dispute surrounding the prevailing wage claim because the Laborers' Union rate was indeed paid by the contractor, as set out in the prevailing rate schedule. However, the court found that whether the rate should have been the Plumbers' or the Laborers' was an issue of union work jurisdiction preempted by the National Labor Relations Act (Pet. App. at 10).

G. The Decision Of The Court Of Appeals.

The court of appeals affirmed the trial court's decision. As it set out, summarizing the Assignment of Errors:

> Thus, appellant's claim that although Kokosing paid its workers the prevailing Laborers' wage, this nonetheless violated the

> prevailing rate statutes because the workers who performed these jobs should have been paid the higher Plumbers' prevailing rate. Without this basic premise, all of appellant's arguments fall.

(App. of Local 94 at pp. 23-24). The appeals court found that the issue of whether work was to be performed by the Laborers or the Plumbers was preempted by the National Labor Relations Act. As a result, it also rejected the contention of petitioner involving "separate bids" because "Appellant simply challenges how the work was separated and categorized" (Pet. App. at 27-28).

H. The Plumbers Local Requests The Lower Court To Certify The Case In The Supreme Court.

As the brief of Plumbers Local 94 points out, the case was attempted to be filed in the Supreme Court of Ohio in two different formats. The first of those formats was pursuant to a "certification due to conflict" between this case and another court of appeals decision. That is Case No. 92-2443. The case for which the petition has been filed is 92-2375 which requested the Supreme Court to certify the record over issues that included those before this Court in the petition.[5] The motion to certify in Case No. 92-2375 was overruled on February 10, 1993 (Pet. App. at pp. 43-44).

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5. The Supreme Court of Ohio has appellate jurisdiction in cases which it determines arise under the United States or Ohio Constitutions or are of *compelling* public or great general interest. Ohio Constitution, Article IV, Section 2.

REASONS FOR DENYING THE WRIT

I.

THE LOWER COURTS PROPERLY RULED THAT THE ISSUE OF WHICH OF TWO UNIONS COMPETING FOR THE SAME CLASS OF WORK DID NOT INVOLVE PREVAILING RATES OF WAGES BUT WAS A MATTER TO RESOLVE PURSUANT TO JURISDICTIONAL PROCEDURES OF THE NATIONAL LABOR RELATIONS ACT.

The Supremacy Clause of the United States Constitution provides that the "Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const., Art. VI, Cl. 2. As this Court has ruled on countless occasions, under this Clause, state and local laws that conflict or interfere with federal law must yield to the exercise of congressional authority and are deemed to be preempted. Federal legislation supersedes state law where Congress has expressly, or by necessary implication, indicated an intent to displace all state laws on the same subject. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). In addition, state laws are preempted under the Supremacy Clause to the extent that they actually conflict with federal law, such as when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

This past term, this Court had occasion once again to consider preemption in *Mary Gade v. National Solid Wastes Management*

Association, 505 U.S. __, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992). As the Court noted, setting forth the general principles:

> Pre-emption may be either expressed or implied and is "compelled whether Congress' " command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." [citing cases]. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption where the scheme of a federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" [citing cases] and conflict pre-emption, where "compliance with both Federal and State regulations is a physical impossibility," [citing cases] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objects of Congress."

The field which is preempted by the Supremacy Clause in this case is based upon labor and management relations, specifically, the National Labor Relations Act ("NLRA"), 29 U.S.C. 151, *et seq*.

The NLRA sets out a comprehensive framework for the federal regulation of labor-management relations and the protection of employee rights. It was passed in order to provide a "coherent basis for . . . delicately structuring the balance of power" among these competing forces, *Amalgamated Assn. of Street, Electric Ry. and Motorcoach Employees v. Lockridge*, 403 U.S. 274, 286 (1971), and reflects a national policy favoring "the practice and procedure of collective bargaining" and the protection of the exercise "by workers of full freedom of association, self-organization, and designation of representatives of their own

choosing." 29 U.S.C. § 151. To this end, Section 7 of the Act, 29 U.S.C. § 157, grants employees the right to form labor organizations, to bargain collectively through representatives of their own choosing and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Section 8 of the Act, 29 U.S.C. § 158, designates certain activities of employers and unions to be unlawful unfair labor practices. It makes it unlawful for employers and unions to interfere with the rights of employees and prohibits each from engaging in certain conduct in their relations with each other in matters relating to collective bargaining, strikes, picketing and the like.

The issue of preemption with respect to the issue in the within case was established by the Supreme Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959), when this Court held that the NLRA preempts state and federal court jurisdiction to remedy conduct that is "arguably protected or prohibited" by the NLRA. This Court more recently summarized *Garmon* preemption as follows:

> *Garmon* preemption "prohibits states regulating activity that the NLRA protects, prohibits or *arguably protects* or prohibits." [citation]. *Garmon* preemption is designed to preclude state interference with the NLRB's interpretation and active enforcement of the integrated scheme of regulation established by the NLRA.

Golden State Transit Corp. v. Los Angeles, 475 U.S. 608, 613 (1986) (emphasis added). *See also, Amalgamated Assn. of Street, Electric Ry. and Motorcoach Employees v. Lockridge, supra*, 403 U.S. 274, 276 (1971) (the NLRA "pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act."); *Allis Chalmers Corp. v. Lueck*, 471 U.S.

202, 208 (1985) (the question is whether a "certain state action is preempted . . .").

The National Labor Relations Act, then, regulates the right of employers as to how they bargain and do not bargain with employees. Further, it provides for deciding issues of jurisdiction between competing unions and resolving them unless all of the parties (*i.e.*, both unions and the employers) have a voluntary method to resolve them. Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D); *NLRB v. Radio and Television Broadcast Engineers Union Local 1212 (Columbia Broadcasting Systems)*, 364 U.S. 573 (1961).

Assuredly, Local 94 does not contest any of the foregoing principles. What the Plumbers attempt to show is that the lower courts improperly found there was no preemption because in their view, there is no jurisdictional issue between competing union. That, of course, is not an untypical effort. But, as this Court has emphasized, labor preemption is concerned with limiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. *Local 100, United States Journeyman and Pipefitters v. Borden*, 373 U.S. 690, 698 (1963).

The decisions of the lower courts in this matter did not deal with preemption of the Ohio prevailing wage statute. To the contrary, they simply ruled that the function of the industrial relations statute was not to resolve a dispute between two competing unions performing the same work.

Ohio Revised Code, at § 4115.03, *et seq.*, created what is known as the Ohio Prevailing Wage Law. The provisions of these sections set forth requirements applicable to wages and hours on public works projects. Ohio Revised Code § 4115.04[6] provides

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6. Section 4115.04. Determination of prevailing wage rate.

(Cont'd)

that every public authority authorized to contract for a public improvement shall have the Department of Industrial Relations determine the prevailing rate of wages for the class of work called for by the improvement.

The procedure by which prevailing rates of wages are to be determined is set out at § 4115.05. It states that this wage shall:

> [N]ot be less at any time during the life of a

(Cont'd)

> Every public authority authorized to contract for or construct with its own forces a public improvement, before advertising for bids or undertaking such construction with its own forces, shall have the department of industrial relations determine the prevailing rates of wages of mechanics and laborers in accordance with Section 4115.05 of the Revised Code for the class of work called for by the public improvement, in the locality where the work is to be performed. Such schedule of wages shall be attached to and made part of the specifications for the work, and shall be printed on the bidding blanks where the work is done by contract. A copy of the bidding blank shall be filed with the department of industrial relations before such contract is awarded. A minimum rate of wages for common laborers, on work coming under the jurisdiction of the department of transportation, shall be fixed in each county of the state by said department of transportation, in accordance with Section 4115.05 of the Revised Code. Sections 4115.03 to 4115.16 of the Revised Code do not apply to public improvements in any case where the federal government or any of its agencies furnishes by or grant all or any part of the funds used in constructing such improvements, provided the federal government or any of its agencies prescribes predetermined minimum wages to be paid to mechanics and laborers employed in the construction of such improvements.

> contract for the public work than the prevailing rate of wages then payable in the same trade or occupation in the locality where such public work is being performed, under collective bargaining *agreements* or *understandings*, between employers and bona fide organizations of labor in force at the date the contract for the public work, relating to the trade or occupation, was made, and collective bargaining agreements or understandings successor thereto.

(emphasis added).

In this case, the Ohio Department of Industrial Relations was asked by the City of Canton to issue wage determinations for its waste water treatment plant. It did so, and certified rates that included, *inter alia*, the rates of the Laborers' Union for "sewer, water works, and utility construction" for a twelve county area in Ohio that included Stark County, where Canton is located.

Local 94 contends that the Department of Industrial Relations has to make a ruling in its favor over the Laborers Union. The Department, however, performed its statutory duty, setting forth the wage rates for the understandings in the area.

As conceded by the Plumbers, Kokosing as well as other contractors have used members of the Laborers Union to perform the exact type of work at issue in Canton's Waste Water Treatment Plant. Contractors have done so throughout the state for the past twenty years.

And, following the filing of the complaint by Local 94 with ODIR, a meeting was held with the Plumbers and other parties in which ODIR concluded that the matter was jurisdictional in nature and outside of ODIR's authority, stating:

> *We as a division cannot enterprise any action where there are jurisdictional labor disputes.*

(March 18, 1988 Memorandum from Hallie Brotherton, Asst. Chief, Division of Prevailing Wage, Minimum Wage and Minors to Geneva Burga, Inspector) (emphasis supplied).

As Margaret Omohundro of the ODIR stated, the Department would:

> [L]ook at the collective bargaining agreements and determine the class of work called for by the public improvement and if there is a dispute as to which local performs it, we would look to the two collective bargaining agreements as well as the dictionary of occupational titles, and if it was determined that both of these crafts did this type of work . . . then we would conclude that's a jurisdictional dispute between the two locals.

(Omohundro Deposition at p. 038).[7] If the dispute is jurisdictional, the Department removes itself from the dispute (Omohundro Deposition at pp. 038-040).

Local 94 makes much of the fact that the Laborers have not performed this specific work in Stark County Ohio as opposed to other areas of work within the geographical jurisdiction of Plumbers Local 94. Be that as it may, it is not the function of the ODIR to have to go into each county of the state to determine a wage rate only if it is actually performed by that craft union in that

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7. All references to "Omohundro Deposition" refer to the deposition of Margaret Omohundro filed in the Stark County Common Pleas Court on November 21, 1991.

county. To the contrary, § 4115.05, *supra*, p. 11, states that the Department is to base its wage rates on the collective bargaining agreements in force at the date the contract for the public work related to the trade or occupation was made. In this case, the Department made a determination that the Laborers' Union contract, dealing with construction of sewage treatment plants, has a wage rate in effect for Stark as well as the counties surrounding Stark.

In sum, nowhere in the Ohio statute is the ODIR to determine disputes between competing unions that claim the same work. Of course, that is what is presented. As Plumbers Local No. 94 business agent was asked:

> Q. . . . Do you ever get into disputes between two different trades as to who's going to perform the work?
>
> A. Yeah, that happens all the time.

(Fonte Deposition at p. 078). He was asked if two unions, such as Sheet Metal Workers and Iron Workers, claimed the same type of work such as "roofs on metal buildings":

> A. I assume they do because they have a dispute.

(Fonte Deposition at p. 078). Should ODIR then certify one of those two craft rates over the other. Fonte was asked:

> Q. Do you know if the Department [of Industrial Relations] has ever had occasion to certify an Ironworker's rate over a Sheet Metal Worker on that kind of issue?
>
> A. Not to my knowledge.

(Fonte Deposition at p. 078). Yet, the Plumbers are contending here exactly that: ODIR should certify one union's rates when two have performed the work.

The function of the Department was met in this case. It certified the rate then payable in the same trade or occupation under collective bargaining agreements or understandings in the locality where such public work was being performed. The Department has made a determination that Laborers perform this work in 19 counties including Stark County, Ohio.

It is not a question of federal preemption of a statute, it is a question of the state government not interfering with that function performed by the federal government.[8]

II.

THE ISSUES SURROUNDING THE SEPARATE BID STATUTES OF OHIO ARE MOOT, THE PROJECT HAVING BEEN COMPLETED.

As set forth in the Union's brief, the State of Ohio has a "separate bid" statute.[9] This statute was followed by the City of

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8. Federal preemption has been found on prevailing rate cases in other situations, *see, e.g., F.H.M. Constructors Inc. v. Village of Canton Housing Authority*, __ F. Supp. __ (1993 W.L. 23587) (1 Wage and Hour Cas. 2d) (BNA) 398 (N.D.N.Y. February 2, 1993) (U.S. Housing Act preempts New York State labor code provisions which, if implemented, will require higher prevailing wages); *Commissioner of Labor v. Boston Housing Authority*, 345 Mass. 406, 188 N.E. 2d 150 (1963) (application of state wage rates to federally funded housing projects would be an impermissible intrusion into federal areas which have been preempted).

9. Section 153.51. Contract may not be awarded for entire work.

(Cont'd)

Canton. There was a separate contract for the "Plumbing" portion of the work. But what Plumbers Local 94 disputes is that the work done by the Laborers Union members should have been within the plumbing portion. The court of appeals correctly noted that this was part and parcel of the issue of its work jurisdiction dispute with the Laborers. In any event, as the trial court found, since the project has been completed, an issue of which craft should receive which portion of the work by bidding is plainly moot under Ohio law. *National Electrical Contractors Association v. City of Painesville*, 36 Ohio St. 60 (1973) (plaintiff's failure to protest or complain about bidding procedures or seeking to enjoin the startup of or continuance of the project rendered plaintiff's claims moot). Since events have "irrevocably eradicated the effects of the alleged violation" and there is "no reasonable expectation" that the alleged violation will occur, such an action is obviously moot. *City of Los Angeles v. Davis*, 44 U.S. 625, 631 (1979).

(Cont'd)

> When more than one trade or kind of mechanical labor, employment, or business is required, no contract for the entire job, or for a greater portion thereof than is embraced in one such trade or kind of mechanical labor shall be awarded, unless the separate bids do not cover all the work and materials required or the bids for the whole or for two or more kinds of work or materials are lower than the separate bids in the aggregate.

CONCLUSION

For the reasons set forth, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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